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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 24 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology consulting firm. It seeks to employ the beneficiary permanently in the United States as a senior programmer analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA 9089), approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to establish ability to pay the proffered wages to the beneficiaries of the approved and pending petitions including the instant beneficiary as of the priority date and to the present.

The record shows that the appeal is properly and timely filed, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In the instant case, the ETA Form 9089 was accepted by the DOL on April 28, 2006. The proffered wage as stated on the ETA Form 9089 is $77,002 per year. On the petition filed on November 14, 2006, the petitioner claims that it has been established in 1982, to have a gross annual income of $5,000,000 and 60 employees.[2]

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the beneficiary claims to have worked for the petitioner since December 5, 2005 and the petitioner submitted the beneficiary's W-2 forms for 2005 and 2006 and paystubs for 2007. The beneficiary's W-2 form for 2005 is not necessarily dispositive because the priority date in this matter is in 2006. The beneficiary's W-2 form for 2006 shows that the petitioner paid the beneficiary $47,425.94 in 2006 and the paystubs for 2007 show that the petitioner paid the beneficiary $48,057.03 in 2007. Therefore, the petitioner failed to establish its ability to pay the instant beneficiary the proffered wage as of the priority date through the examination of wages already paid to the beneficiary. The petitioner must demonstrate that it had sufficient net income or net current assets to pay the instant beneficiary the differences of $29,576.06 in 2006 and $28,944.97 in 2007 respectively between wages actually paid to the beneficiary and the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period. USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the

[2] However, the petitioner claimed 40 employees on the ETA Form 9089 filed six months ago on April 28, 2006 but 31 employees in the response letter, dated February 11, 2008, to the director's request for evidence.

proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18.

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[3] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The record contains copies of Form 1120 U.S. Corporation Income Tax Return for 2005 and 2006 filed by an entity other than the petitioner, Abacus Software and Subsidiary, with a different federal employer identification number. The tax returns were filed as consolidated returns. Corporations are classified as members of a controlled group if they are connected through certain stock ownership. All corporate members of a controlled group are treated as one single entity for tax purposes (i.e., only one set of graduated income tax brackets and respective tax rates applies to the group's total taxable income). Each member of the group can file its own tax return rather than the group filing one consolidated return. However, members of a controlled group often consolidate their financial statements and file a consolidated tax return. The controlled group of corporations is subject to limitations on tax benefits to ensure the benefits of the group do not amount to more than those to which one single corporation would be entitled, however, counsel did not submit the attached Form 851 required by the Form 1120. The record does not contain any documentary evidence listing all subsidiaries of the corporate group and listing the petitioner as one of the members. The record does not contain any evidence showing that the petitioner is authorized to use Abacus software and Subsidiary's income or assets to pay its employees the proffered wages. The petitioner here is a corporation established under California law and registered as a foreign corporation doing business in Massachusetts. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore, the AAO cannot consider the tax returns filed by Abacus Software and Subsidiary as primary evidence in determining the petitioner's ability to pay the proffered wage in this matter. Counsel failed to submit regulatory-prescribed evidence to demonstrate that the petitioner had sufficient net income or net current assets to pay the instant beneficiary the difference between wages actually paid to the instant beneficiary and the proffered wage in 2006, the year of the priority date.

The record does not contain any regulatory-prescribed evidence, such as annual reports, tax returns or audited financial statements, for 2007. On appeal, counsel asserts that the director's request for evidence (RFE) was issued only two days after the 2007 year end and the petitioner could not prepare and file its 2007 tax return within the narrow window of time to respond to the RFE. However, the record before this office closed on May 28, 2008 with the receipt by the AAO of counsel's brief in support of the instant appeal. As of that date the petitioner's federal tax return for 2007 should have been available. However, counsel did not submit the petitioner's 2007 tax return, annual report or audited financial statements, nor did counsel explain why these documents were not submitted. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove

by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The tax returns, annual reports or audited financial statements would have demonstrated the amount of net income or net current assets the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay all beneficiaries of the approved petitions and the instant beneficiary the proffered wages as of the priority date through an examination of wages paid to the beneficiary, and its net income or net current assets.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions or approved petitions, including I-129 nonimmigrant petitions.

USCIS records show that the petitioner filed 33 additional I-140 immigrant petitions and among them, 16 immigrant petitions were approved by USCIS for which the petitioner was obligated to pay the beneficiaries the proffered wages in the relevant years in this matter, i.e., the petitioner was responsible to pay 14 proffered wages in 2006, 16 in 2007, 15 in 2008 and 11 in 2009[4] as well as H-1B employees in addition to the instant beneficiary.

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[4] USCIS records show that the 16 approved immigrant petitions related to the ability to pay the proffered wage in this matter are as follows:

-- [redacted] filed for [redacted] on September 20, 2005 with the priority date of June 24, 2005, and approved on April 13, 2006. The beneficiary was adjusted to lawful permanent resident status on July 28, 2010.

-- [redacted] filed for [redacted] on September 23, 2005 with the priority date of June 28, 2005, and approved on May 12, 2006. The beneficiary was adjusted to lawful permanent resident status on July 18, 2007.

-- [redacted] filed for [redacted] on October 17, 2005 with the priority date of June 21, 2005, and approved on April 26, 2006. The beneficiary was adjusted to lawful permanent resident status on July 13, 2007.

-- [redacted] filed for [redacted] on October 27, 2005 with the priority date of June 23, 2005, and approved on January 31, 2006. The beneficiary was adjusted to lawful permanent resident status on August 16, 2008.

-- [redacted] filed for [redacted] on March 27, 2006 with the priority date of January 24, 2006, and approved on May 19, 2006. The beneficiary was adjusted to lawful permanent resident

In response to the director's RFE and on appeal, counsel provided information on the immigrant petitions filed by the petitioner in recent years, USCIS receipt numbers and proffered wages, and 2006 W-2 forms for employees. As previously noted, the petitioner was responsible to pay 14 proffered wages in 2006 because these petitions were with a priority date in or before 2006 and had not been approved or the beneficiaries had not been adjusted to lawful permanent resident status in or after 2006. The total proffered wages for those 14 beneficiaries the petitioner was responsible to pay in 2006 were $944,674.79.[5] The 2006 W-2 forms for the petitioner's employees in the record show that the petitioner paid one full proffered wage ($60,622.36 out of the proffered wage $50,000), and additional 10 partial

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status on August 3, 2010.

-- [redacted] filed for [redacted] on May 11, 2006 with the priority date of December 14, 2005, and approved on September 28, 2006. The beneficiary was adjusted to lawful permanent resident status on August 20, 2010.

-- [redacted] filed for [redacted] on July 25, 2006 with the priority date of November 29, 2005, and approved on March 29, 2007. The beneficiary was adjusted to lawful permanent resident status on August 9, 2010.

-- [redacted] filed for [redacted] on November 20, 2006 with the priority date of September 20, 2006, and approved on December 4, 2006. The beneficiary was adjusted to lawful permanent resident status on June 10, 2009.

-- [redacted] filed for [redacted] on February 20, 2007 with the priority date of November 17, 2003, and approved on April 13, 2007. The beneficiary was adjusted to lawful permanent resident status on August 3, 2010.

-- [redacted] filed for [redacted] on September 28, 2007 with the priority date of December 22, 2006, and approved on December 15, 2008. The beneficiary's adjustment of status application was pending as of June 10, 2009.

-- [redacted] filed for [redacted] on October 5, 2007 with the priority date of October 21, 2003, and approved on June 23, 2008. The beneficiary was adjusted to lawful permanent resident status on September 2, 2009.

-- [redacted] filed for [redacted] on October 9, 2007 with the priority date of November 17, 2006, and approved on January 26, 2009.

-- [redacted] filed for [redacted] on November 7, 2007 with the priority date of August 8, 2007, and approved on June 23, 2008.

-- [redacted] filed for [redacted] on January 11, 2008 with the priority date of April 24, 2006, and approved on August 13, 2008. The beneficiary was adjusted to lawful permanent resident status on September 16, 2009.

-- [redacted] filed for Sudhini on February 14, 2008 with the priority date of June 19, 2007, and approved on June 30, 2008.

-- [redacted] filed for Glauster on October 30, 2009 with the priority date of December 11, 2008, and approved on December 1, 2009.

[5] The total 13 proffered wages counsel provided information were $876,563. For the one counsel did not provide proffered wage information, this office adopts the average figure ($68,111.79 per year) of those 13 proffered wages and the proffered wage for the instant beneficiary as the proffered wage.

proffered wages of $411,794.58,[6] and therefore, the petitioner must demonstrate that it had sufficient net income or net current assets to pay the difference of $414,768.42 between wages paid to the beneficiaries and the proffered wages before it establish its ability to pay the difference between wages actually paid to the instant beneficiary and his proffered wage in 2006.

As previously discussed, the AAO cannot consider the consolidated tax return for 2006 filed by [redacted] as primary evidence in determining the petitioner's ability to pay the proffered wage in this matter because counsel failed to establish that the petitioner is a member of the controlled group and that the petitioner has ever been authorized to use the entire net income or net current assets of the controlled group to establish its ability to pay the proffered wage. However, even if the petitioner had been allowed to use it to establish its ability to pay the proffered wage, the controlled group's net income of $221,980 or net current assets of $26,626 in 2006 would not be sufficient to pay the difference of $414,768.42 between wages actually paid to beneficiaries and the proffered wages that year. Therefore, the petitioner would fail to establish ability to pay the proffered wages to the approved beneficiaries in 2006 and further fail to establish ability to pay the instant beneficiary the proffered wage in the year of the priority date in the instant case even if it had authorization to use the controlled group's entire net income or net current assets.

The petitioner was responsible to pay 15 proffered wages in 2007, 14 in 2008 and 11 in 2009. The record does not contain W-2 forms for these beneficiaries or any type of regulatory-prescribed evidence of the petitioner's financial information for these years. Therefore, the petitioner failed to establish ability to pay the proffered wages and further failed to establish ability to pay the instant beneficiary the proffered wage in the year of 2007 and thereafter because it failed to submit any regulatory-prescribed evidence for the petitioner's financial situation in these years.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*,

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[6] The W-2 forms in the record show that the petitioner paid [redacted] $62,006.37, [redacted] $24,419.53, [redacted] $25,800.02, [redacted] $47,192.51, [redacted] $60,622.36, [redacted] $55,936.04, [redacted] $33,036.04, [redacted] $35,820.98, [redacted] $44,220.00, [redacted] $54,991.17, and [redacted] $28,371.68.

USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner failed to establish its ability to pay all proffered wages and even the proffered wage for the instant beneficiary for a single year. Counsel asserts that for many years, the petitioner employed between 100 to 150 IT consultants at one time. However, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). While the petitioner claimed to have 40 employees on the ETA From 9089 filed in April 2006, on the petition filed six months later, it claimed to have 60 employees and further counsel claimed in his February 11, 2008 letter that the petitioner presently had 31 employees. With such dramatically changed number of employees, it is difficult to conclude that the petitioner's business is viable. Further, while the petitioner claimed to have 40 and 60 different number of employees in 2006 on the ETA Form 9089 and the petition, the consolidated tax return filed by Abacus Software and Subsidiary for 2006 shows that the entire controlled group paid salaries and wages of $353,052 which was at the level of $8,826.30 per person per year based on 40 employees or even at the level of $5,884.20 per person per year based on 60 employees as claimed on the petition. In addition, given the record as a whole, the petitioner's history of filing immigrant and nonimmigrant petitions, the AAO must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wages.

Counsel's assertions on appeal cannot overcome the grounds of the director's denial that the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wages during the year of the priority date and subsequent years. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wages beginning on the priority date to the present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.